Nos. 90-954; 90-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, *et al.*,
Petitioners,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether good faith requests for modification of consent decrees in public institutional reform litigation should be considered under the "grievous wrong" standard, or under a "less burdensome alternative" standard that appropriately accommodates state and local interests while preserving the purposes of the decree.

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SUMMARY OF ARGUMENT AND INTEREST OF *AMICI CURIAE*

The refusal of the court below to allow modification of a consent decree in this prison reform case absent "a clear showing of a grievous wrong evoked by new and unforeseen conditions," *see United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), raises serious constitutional concerns. The decision below also threatens to discourage the use of consent decrees in complex public institutional reform litigation. The Court has recognized repeatedly that such litigation requires the courts to "take into account the interests of state and local authorities in managing their own affairs" in order to avoid unnecessary federal court intrusion into state and local governance. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). Indeed, just three months ago the Court held that the *Swift* "grievous wrong" standard does not appropriately accommodate state and local interests in public institutional reform litigation, and thus cannot be the basis for determining whether a school desegregation decree should be dissolved or modified. *See Board of Education of Oklahoma City Public Schools v. Dowell*, 111 S.Ct. 630, 637 (1991).

This concern for accommodating state and local interests likewise should render the *Swift* standard inapplicable to the request of a state or local government to modify a consent decree in a prison reform case. Consent decrees, no less than litigated decrees, involve the federal courts in continuing and potentially intrusive supervision of state and local institutions. This federal authority, whether the product of initial consent or litigation, must be exercised within the boundaries inherent in our federal system. By refusing to permit a modification of a decree to allow "double-celling" of inmates—a practice that satisfies the Constitution, *see Bell v. Wolfish*, 441 U.S. 520 (1979)—the court below ignored this Court's admonition that in exercising their equitable authority the federal

courts must accommodate state and local interests, "consistent with the Constitution." *See Milliken v. Bradley*, 433 U.S. at 280-81.

Rigid adherence to the original terms of a consent decree involving a public institution raises equally serious practical concerns. The Court has recognized the importance and utility of consent decrees as a means of resolving complex litigation without trial. *See, e.g., Local 93 v. City of Cleveland*, 478 U.S. 501, 523 n.13 (1986). A large number of institutional reform cases brought against state and local governments are resolved by consent decree. These decrees affect a broad range of local governmental functions, including the administration of schools, prisons, and hospitals.[1]

These federal court decrees often are far-ranging, dynamic documents that may govern the administration of public institutions for decades. As this case illustrates, the circumstances that affect the operation of these decrees may change due to unforeseeable social, political or economic developments. Such changes compel government officials to seek modification of the decrees. Absent assurance that the federal courts will sympathetically consider the problems arising during the administration of consent decrees, state and local government officials will be deterred from entering into such decrees. Because *Dowell* prohibits the federal courts from applying the strict *Swift* standard to litigated decrees, affirmance of the decision below would create a substantial incentive for public officials to resolve disputes through protracted litigation rather than through consent decrees.

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[1] *See* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1020-21 (1986). For convenience, we refer to such cases generically as "public institutional reform litigation."

Different issues are presented by efforts to modify consent decrees in civil litigation not involving public institutional reform. *See Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989).

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in legal issues that affect the powers and responsibilities of state and local governments. We submit that the federal courts must approach the modification and administration of consent decrees in public institutional reform litigation with due regard for the special needs of state and local governments and the public on whose behalf they act. We offer this brief *amicus curiae* to propose an alternative to the *Swift* standard for use in public institutional reform cases and to urge the Court to adopt that standard and reverse the decision below.[2]

ARGUMENT

I. REQUESTS TO MODIFY CONSENT DECREES IN PUBLIC INSTITUTIONAL REFORM LITIGATION SHOULD BE REVIEWED UNDER A STANDARD THAT APPROPRIATELY ACCOMMODATES STATE AND LOCAL INTERESTS.

The exercise, in equity, of federal judicial authority in cases involving state and local institutions necessarily implicates "'delicate issues of federal-state relationships.'" *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976), *quoting Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974). Litigation that seeks to compel changes in the administration of public institutions such as schools, prisons, or hospitals requires federal courts to accommodate state and local interests in the administration of those institutions. As the Court has recognized, such judicial accommodation is particularly difficult—and warrants particular restraint—in

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[2] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

prison reform litigation. *See Procunier v. Martinez*, 416 U.S. 396 (1974).[3]

The Court repeatedly has expressed concerns regarding federal-state relationships in cases addressing appropriate remedies for constitutional violations by public authorities. For example, in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court admonished that "the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute." *Id.* at 562 (holding that double-celling of pretrial detainees does not violate detainees' due process rights under the Fourteenth Amendment).[4]

Just this Term the Court reaffirmed that concerns of federalism apply to the modification of a judicial decree involving public institutional reform. In *Board of Education of Oklahoma City Public Schools v. Dowell*, 111

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[3] [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . . [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of this fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Procunier v. Martinez, 416 U.S. at 404-05 (footnote omitted).

While the holding in *Procunier* was partially overruled in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the principles expressed in the language quoted above were reaffirmed in that case. *See id.* at 407-08.

[4] *See also Rhodes v. Chapman*, 452 U.S. 337, 349-50 (1981) ("There being no constitutional violation, the District Court had no authority to consider whether double celling . . . was the best response to the increase in Ohio's statewide prison population."); *Milliken v. Bradley*, 433 U.S. at 282 (1977) ("Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.").

S.Ct. 630 (1991), the Court relied upon *Milliken v. Bradley* and other cases dealing with judicial authority to impose remedies for constitutional violations, to hold that a request for the modification or dissolution of a school desegregation decree must be judged under standards that give due weight to local control over public institutions. Holding that the *Swift* "grievous wrong" standard was inappropriately applied by the court of appeals to a request to dissolve the decree, the Court stated that "[c]onsiderations based on the allocation of powers within our federal system, we think, support our view that the quoted language from *Swift* does not provide the proper standard to apply to injunctions entered in school desegregation cases." 111 S.Ct. at 637.[5]

Dowell did not involve a request for the modification of an ongoing consent decree because of changed circumstances. *But see Dowell*, 111 S.Ct. at 639 n.1 (Marshall, J., dissenting). The concern for federal-state relationships expressed in *Dowell* is, however, fully applicable to a request by state or local officials for such a modification. An order of a federal court entered on consent of the parties is no less an exercise of federal judicial power than any other judicial act. *See, e.g., Local 93 v. City of Cleveland*, 478 U.S. 501, 525 (1986); *United States v. Swift & Co.*, 286 U.S. at 114; 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[5] (1991) ("the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication"). Whether the result of litigation or consent, a decree entered by a federal court in public institutional reform litigation requires the court to engage in continuing supervision

[5] The Court also emphasized that the standard articulated in *Swift* cannot be fully understood in isolation from the facts of that case. *See Dowell*, 111 S.Ct. at 636. *See also United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968); *New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 968 (2d Cir.) (Friendly, J.), *cert. denied*, 464 U.S. 915 (1983).

over the operation of public institutions. The exercise of the court's equitable authority throughout the life of the consent decree is no different than in a case involving a litigated decree. The concerns expressed in *Dowell*, and in the cases relied upon in *Dowell*, thus apply to the modification of a consent decree.

Amici submit that the reasons for rejecting the *Swift* standard in consent decree cases are at least as compelling as those for rejecting that standard in cases, like *Dowell*, involving litigated decrees. In *City of Cleveland*, a case involving a municipal defendant, the Court approvingly quoted our *amicus curiae* brief for the proposition that consent decrees serve important functions and that there are "several . . . advantages" of consent decrees "as a means for settling litigation." *See* 478 U.S. at 523 n.13 (quoting Brief of *Amici Curaie* National League of Cities, *et al.*). The utilization of consent decrees by public officials will be deterred if a double standard is created, *i.e.*, if litigated decrees are, as the Court held in *Dowell*, not subject to the "grievous wrong" standard of *Swift*, while consent decrees remain subject to that strict standard. *See Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979) (analyzing requests for modification under a strict standard will "tend to discourage the settlement of injunction actions by consent decree"), *cert. denied*, 444 U.S. 1026 (1980).

Moreover, the Court has suggested that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *City of Cleveland*, 478 U.S. at 525. It is apparent that even greater sensitivity to the state and local role in operating public institutions is required if consent decree obligations undertaken by the parties may enlarge the scope of federal oversight of public institutions beyond constitutional or statutory requirements.

The factors that distinguish public institutional reform litigation from a traditional injunctive action against private entities also bear emphasis. First, the defendants in an institutional reform case typically are the state or local officials responsible for administering the institution. A settlement arising out of such litigation often will reflect policy decisions about the operation of the public institution that are based on circumstances and predictions subject to change. *See Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1120. The *Swift* standard, formulated in a case brought to enjoin in perpetuity recurrent, massive violations of the antitrust laws, does not provide the flexibility to deal with such changes.

Second, decrees in public institutional reform cases frequently have a "spillover" effect that has a significant impact on public interests beyond those represented by the parties before the court. *See New York State Association for Retarded Children v. Carey*, 706 F.2d at 969-70 (citing Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976)); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. at 1036-37. For example, the question whether to modify the consent decree in this case affects not only the interests of the pretrial detainees of the Suffolk County Jail and the state and local corrections officials; it also has a direct impact upon public safety and local law enforcement.

Considerations like these have led a majority of federal appellate courts to adopt a flexible standard for modification of consent decrees that better responds to the broad range of interests invariably involved in public institutional reform litigation. *See New York State Association for Retarded Children v. Carey*, 706 F.2d at 969-71; *Philadelphia Welfare Rights Organization v.*

Shapp, 602 F.2d at 1120-21. *See also Heath v. De Courcy*, 888 F.2d at 1109-10 (collecting cases). In contrast to the court below, these courts of appeals have appropriately considered the complexity of public institutional reform litigation and the "delicate issues of federal-state relationships" implicated in these cases. They also have recognized the inhibitory effect of a rigid standard for modification of consent decrees. The reasoning of these lower court cases persuasively establishes that the *Swift* standard is not appropriate for modification of consent decrees governing the operation of public institutions. The reliance of the court below on the *Swift* standard to assess the petitioners' request to modify the consent decree was error.

II. A REQUEST FOR MODIFICATION OF A CONSENT DECREE IN PUBLIC INSTITUTIONAL REFORM LITIGATION SHOULD BE EVALUATED UNDER A "LESS BURDENSOME ALTERNATIVE" STANDARD.

Reversal in this case is required because of the erroneous application of the *Swift* standard by the court below. *Amici* submit, however, that the question of the proper standard to be applied to the modification of consent decrees in public institutional reform litigation is a question of great importance, adequately presented by the record in this case, that should be addressed by the Court.

A. An Appropriate Standard Must Allow for Deference to the Judgment of State and Local Officials.

As noted above, the majority of federal appellate courts have rejected the *Swift* standard in favor of more flexible standards for the assessment of requests to modify consent decrees in public institutional reform litigation. While the analysis applied by these courts varies, their decisions emphasize four factors.

First, these courts have examined whether there has been a change in law or circumstances that justifies modification of the decree. *See, e.g., Nelson v. Collins*, 659 F.2d 420, 427-29 (4th Cir. 1981) (en banc) (increase in prison population and clarification of underlying law by the Court in *Bell v. Wolfish* and *Rhodes v. Chapman* justified modification of consent decree to permit double-celling). Second, they have balanced the interests of the parties and the public. *See, e.g., Heath v. De Courcy*, 888 F.2d at 1109 (acknowledging that institutional reform decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions"). Third, courts have considered the good faith of the defendant. *See, e.g., Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1120-21. Finally, they have examined whether the proposed modification would vitiate the purpose of the decree. *See, e.g., id.* at 1120 (modification would "not leave class members open to the evils to which the lawsuit was first addressed").

While all of these factors are relevant to the modification of consent decrees under a "flexible" approach, the lower courts have thus far failed to devise a coherent analytical framework for applying them. Moreover, while a number of the lower courts have acknowledged the issues of federal-state relations raised by institutional reform litigation, *see, e.g., Heath*, 888 F.2d at 1109, the concern for the local administration of public institutions is not consistently reflected in their decisions. Nor do they adequately articulate the degree of deference due to the judgment of the state and local government officials charged with operation of the public institutions.

To state the obvious, judges are not prison administrators, nor are they responsible to the public for imple-

mentation of ongoing community programs. Unless the Court formulates an appropriate standard that can be consistently applied by the lower courts, *amici* fear that a so-called "flexible" standard may degenerate into little more than an exercise in *ad hoc* judicial supervision of public institutions. In such event, the federal court's relatively unrestrained "equitable" discretion could displace focussed evaluation of detailed alternatives devised by professionals best able to address the complex underlying problems. *Amici* accordingly propose the standard below.

B. A Proposed "Less Burdensome Alternative" Standard.

Amici propose that state or local government officials should be afforded modification of a consent decree governing the administration of a public institution if:

(1) the officials show that, despite good faith efforts to comply with the decree, a change in circumstances has arisen during the administration of the decree that excessively burdens a substantial public interest;

(2) the officials show that the purposes of the decree can be accomplished by less burdensome means; and

(3) the party opposing the proposed modification is unable to show either that the proposed modification would violate its constitutional or statutory rights, or that an alternative modification that serves the purposes of the original decree is preferable to the beneficiaries of the decree and would equally well address the burden on the public interest created by continued adherence to the original decree.

This proposed standard—a "less burdensome alternative" standard, *see Dowell*, 111 S.Ct. at 639 n.1 (Marshall, J., dissenting)—seeks to accommodate state and local interests in an appropriate manner while recognizing the obligatory, partly contractual character of a consent decree. The first element of the proposed standard—lim-

iting modifications to situations in which changed circumstances establish that continued enforcement of the decree imposes an undue burden on a substantial public interest—ensures that modifications will not be granted absent a strong showing. The mere fact that compliance with a decree is more expensive than contemplated, or that state or local revenues are lower than in the past, would not in our view ordinarily constitute the type of burden that would, without more, warrant modification of the decree. Nor would the good faith of a party seeking modification generally be demonstrable where the changes in circumstances offered to justify the modification were clearly foreseeable at the time the decree was negotiated.

We recognize that public officials, no less than private parties, as a general rule must abide by their agreements. Nor can they incessantly dispute the original premises of a decree or its attendant cost, if those premises or that cost were or should have been addressed at the time the decree was negotiated.[6] Once the threshold for obtaining a modification has been met, however, we submit that the federal courts should show substantial deference to the judgment of state and local officials concerning the means by which the purposes of the decree may be achieved. *See Procunier v. Martinez*, 416 U.S. at 404-405; *Bell v. Wolfish*, 441 U.S. at 562.[7]

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[6] These requirements thus recognize the partly contractual nature of a consent decree. *See City of Cleveland*, 478 U.S. at 519 (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-237 & n.10 (1975)). The plaintiffs are entitled to the benefit of their bargain with the state or local government to the extent that this bargain is not incompatible with legitimate conflicting government interests. Indeed, the "changed circumstances" and "increased burden" elements of the proposed standard are analogous to the contract law principle of "impracticability" pursuant to which the obligor's performance may be discharged by changed circumstances rendering that performance unduly burdensome. *See Restatement (Second) of Contracts* § 261 (1979).

[7] While the proposed standard requires the state or local officials to show that the "purposes of the decree" can be served through less

We do not propose that the federal courts blindly defer to the judgment of state or local officials in devising less burdensome means for achieving the purposes of a decree. A federal court must ensure that the proposed modification does not violate the constitutional or statutory rights the decree was designed to protect. Moreover, there may be cases in which the beneficiaries of a decree can frame an alternative solution to the problem identified by the government officials that successfully addresses that problem, yet is preferable to the beneficiaries. Indeed, expressly recognizing this possibility may encourage the contending parties to explore alternatives, thereby avoiding the need for judicial arbitration of their differences. The courts may entertain any proposals as long as they serve both the purposes of the decree and the interests of the public. Federal courts must, however, give deference to the considered views of appropriate state or local officials when determining whether the proposed modification addresses the burden created by the decree.

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burdensome means, we do not agree with the court below insofar as its opinion suggests that the "purposes" of the decree are to be ascertained solely through the detailed language of the decree itself—*i.e.*, that the decree's purposes are coextensive with the terms "agreed upon" in the decree sought to be modified.

CONCLUSION

The judgment of the court of appeals should be reversed.

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April 15, 1991